Supreme Court, U.S.
FILED
98 943 DEC 9 1998
OFFICE OF THE CLERK

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

CHESTER HOLLMAN,

*Petitioner,*

*vs.*

HARRY E. WILSON II, SUPERINTENDENT, RETREAT;
OFFICE OF DISTRICT ATTORNEY OF PHILADELPHIA;
ATTORNEY GENERAL OF PENNSYLVANIA,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

NORRIS E. GELMAN
*Attorney for Petitioner*
The Public Ledger Building
620 Chestnut Street
Suite 940
Philadelphia, Pennsylvania 19106
(215) 574-0513

149728

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

## QUESTION PRESENTED FOR REVIEW

I. Where police negligence in the retrieval of a critical witness' criminal record resulted in the prosecutor providing defense counsel with a record for that witness which revealed no prior convictions for felonies or misdemeanors (when in fact there were ten such convictions) and because of this negligence the witness was able to perjure himself before the jury on three occasions by stating he had never been convicted of any felonies or misdemeanors, did the Third Circuit correctly find that there had been no *Brady* violations, that the negligence excused the failure to provide the defense with the prior record of the witness, and that the confidence required by *Kyles* could be placed in the verdicts returned even though the verdicts may well rest in whole or in part on testimony bolstered by perjured testimony?

## TABLE OF CONTENTS


| | *Page* |
|---|---|
| Question Presented for Review | i |
| Table of Contents | ii |
| Table of Cited Authorities | iii |
| Opinions Below | 1 |
| Statement of Jurisdiction | 1 |
| Constitutional Provisions Involved | 2 |
| Statement of the Case | 2 |
| A. Proceeding and Disposition in the Courts Below: | 2 |
| Statement of Facts | 8 |
| Reasons for Granting the Writ | 13 |
| Conclusion | 17 |

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Brady v. Maryland*, 373 U.S. 83 (1963) ..... *passim*

*Hollman v. Wilson*, 158 F.3d 177 (3d Cir. 1998) ..... 1, 2, 3, 4, 5, 6, 10

*Kyles v. Whitely*, 514 U.S. 419, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995) ..... i, 5, 7, 8, 13, 15, 16

*Smith v. Phillips*, 455 U.S. 209 at 219 ..... 5

**Statutes:**

18 Pa. C.S.A. § 4906(a) ..... 3

28 U.S.C. § 1254 ..... 1

28 U.S.C. § 1254(1) ..... 1

28 U.S.C. § 2254 ..... 1

28 U.S.C. § 2254(d) ..... 5

**United States Constitution:**

Fourteenth Amendment ..... 2

## APPENDIX

*Page*

Appendix A — Opinion Of The United States Court Of Appeals For The Third Circuit Filed September 11, 1998 ..... 1a

Appendix B — Order Of The United States District Court For The Eastern District Of Pennsylvania Entered November 24, 1997 And Filed November 25, 1997 ..... 13a

Appendix C — Report And Recommendation Of The United States District Court For The Eastern District Of Pennsylvania Entered And Filed November 4, 1997 ..... 14a

Appendix D — Order Of The Supreme Court Of Pennsylvania, Eastern Division Denying Petition For Allowance Of Appeal Entered April 1, 1996 ..... 25a

Appendix E — Order Of The Superior Court Of Pennsylvania Denying Request For Reargument Dated July 20, 1995 ..... 26a

Appendix F — Judgment And Memorandum Of The Superior Court Of Pennsylvania Dated And Filed May 17, 1995 ..... 27a

Appendix G — Opinion Of The Court Of Common Pleas Of Philadelphia County, Trial Division Dated August 4, 1994 ..... 32a

The Petitioner Chester Hollman respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit which was entered in the above-entitled case on September 11, 1998.

## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit, entitled *Hollman v. Wilson*, is reported at 158 F.3d 177 (3d Cir. 1998) and is included in the appendix attached hereto at pages 1a-12a.

Judge Pollak's Order dated November 24, 1997 adopting the Report and Recommendation of the Magistrate without discussion is included in the appendix at page 13a. Judge Pollak granted a certificate of appeal in this Order. Magistrate Judge Thomas Reuter's Report and Recommendation dated November 4, 1997 is also included in the appendix at pages 14a to 24a.

The Pennsylvania Supreme Court's Order dated April 1, 1996 denying Allocatur is in the appendix at page 25a. The July 20, 1995 Order of the Superior Court refusing to Reconsider its May 17, 1995 opinion is found at appendix 26a. The Superior Court of Pennsylvania's unpublished memorandum opinion dated May 17, 1997 is in the appendix at pages 27a to 37a.

## STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Invoking federal jurisdiction under 28 U.S.C. § 2254 and 28 U.S.C. § 1254 petitioner filed a petition for a writ of habeas corpus by a person in state custody in the United States District Court for the Eastern District of Pennsylvania on March 24,

1997. The United States District Judge, The Honorable Louis H. Pollak adopted the Report and Recommendation of the Magistrate and denied the writ, but issued a certificate of appealability on November 24, 1997. The Third Circuit denied relief in a published opinion, *Hollman v. Wilson*, 158 F.3d 177 (3d Cir. 1998). Petitioner did not seek a petition for rehearing.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Nor shall any State deprive any person of life, liberty or property without due process of law . . .

## STATEMENT OF THE CASE

### A. Proceeding and Disposition in the Courts Below:

Petitioner was tried in the Court of Common Pleas of Philadelphia County before a jury Murder and related crimes. He was convicted of second degree murder which in Pennsylvania is felony murder or a killing committed in furtherance of a felony, here robbery.

Gerald Stein, Esquire represented him at trial. Present counsel entered the case at the post trial motions stage, handled the state court appeals and the habeas proceedings.

Following the denial of post trial motions, Petitioner was sentenced to life in prison.

Petitioner's case has always centered on what he deemed to be a *Brady* violation that was aggravated by the deliberate perjury of the witness to whom the *Brady* violation related.

The main witness against Petitioner was an alleged eyewitness named Andre Dawkins who positively identified Petitioner as being the accomplice of the trigger person who fatally shot the deceased during a robbery.

Dawkins had an extensive record of ten prior convictions for misdemeanors and felonies, one of which was Falsely Incriminating Another — a conviction that by itself, let alone with nine others, would have gone far toward destroying his credibility.[1] These ten convictions were not turned over to the defense because of an error by the police identification unit that failed to identify Dawkins' fingerprints on file after his most recent arrest (within days of Petitioner's trial) and mistakenly gave him a new identification number which prevented the retrieval of his past record of ten convictions. This was police negligence and was variously termed an "administrative mistake" or negligence throughout these proceedings.

This error could have been easily cured by Dawkins on the stand had he admitted to his past criminal career. Dawkins chose to perjure himself three times, and passed himself off as a good citizen by denying his past criminal record, as the Third Circuit found. *Hollman*, note 8.[2]

---

1. 18 Pa. C.S.A. § 4906(a) provides:

> (a) Falsely incriminating another. — A person who knowingly gives false information to any law enforcement officer with intent to implicate another commits a misdemeanor of the second degree.

2. Q. [by defense counsel]: Is that all you have on your record, summary offenses?

(Cont'd)

Petitioner's habeas petition was resolved against him by the Third Circuit which held that the police negligence in the retrieval of Andre Dawkins' prior criminal record which led to the false assumption that he had no prior convictions for misdemeanors or felonies when in fact he had ten such convictions did not implicate *Brady v. Maryland*, 373 U.S. 83 (1963). *See Hollman v. Wilson*, *supra*, at note 3 (3d Cir. 1998) (App. 10a).

The Third Circuit also held:

> Without some record evidence that it was something more than a mistake, we cannot conclude that the government withheld information that was readily available to it or constructively in its possession. Accordingly, we find that the government did not withhold Dawkins's [sic] full criminal history and that the failure of the government to produce this material does not constitute a *Brady* violation.

*Hollman*, *supra*, at (App. 8a).

---

(Cont'd)

> A. I have summaries. I have a burglary. I ain't been a saint all my life. I just know *I just don't do no wrong*, not in that sense. (N.T. pg. 1267; 31A) (Emphasis supplied).

Shortly thereafter he testified, referring to his open burglary arrest of three days previous:

> A. I signed my own bail because *I don't have a record.* (N.T. pg. 1268) (Emphasis supplied).

Again, referring to his release on bail on his recent burglary arrest he stated:

> A. . . . I don't have a record, and they let me sign myself out . . . (N.T. pg. 1272; 32A) (Emphasis supplied).

As shown *infra*, by excusing the *Brady* violation because of police negligence the Third Circuit ran afoul of *Kyles v. Whitely*, 514 U.S. 419, 437-38, 131 L. Ed. 2d 490, 115 S. Ct. 1555, at 1567 (1995),[3] and resurrected the good faith exception to *Brady* violations that this Court had long rejected.

By requiring "some record evidence that it was something more than a mistake" in order to trigger *Brady* the Third Circuit placed *Brady* on a fault footing — requiring misconduct on the part of the police or prosecutor rather than an administrative mistake or negligence to trigger *Brady*, and again ruled in a manner which is in conflict with this Court's decisions that have always held that it is the impact on the accused that is paramount, not whether or not the prosecution acted in good or bad faith. *Brady*, at 87.

It has always been the character of the evidence and not the character of the prosecutor that rules *Brady* and the values protected by *Brady*. *Smith v. Phillips*, 455 U.S. 209 at 219 reaffirmed *Brady*, at 87, holding that the "touchstone of due process analysis is the fairness of the trial, not the culpability of the prosecutor."

In addition, the police clerical error led directly to witness Dawkins' ability to perjure himself on three occasions and deny that he had any prior criminal convictions. The Third Circuit found that he had committed perjury three times when he denied his past criminal history. *See Hollman v. Wilson*, *supra*, at note 8. (App. 10a).

---

3. *Kyles* was decided on April 19, 1995, prior to the Superior Court ruling on petitioner's appeal (May 17, 1995) and petitioner is therefore entitled to rely on it to show that his state court ruling "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d).

Without this host of impeachment evidence, Dawkins was able to valorize himself in the eyes of the jury and become the witness on whom the prosecutor relied most heavily in his summation. There was other evidence introduced against Petitioner that will be fully described below.

The trial court and the Superior Court of Pennsylvania ruled that Dawkins' undisclosed record of ten prior convictions did not constitute *Brady* material. Instead the ten convictions were treated as after discovered evidence and both courts held that had defense counsel been able to impeach Dawkins with these convictions an acquittal would not have resulted.

Reargument was sought in the Superior Court and denied on May 17, 1995.

The Supreme Court of Pennsylvania denied Allocatur which is their certiorari jurisdiction on April 1, 1996.

The instant habeas petition was filed on March 24, 1997 and is subject to the AEDPA.

The denial of habeas relief was affirmed by the Third Circuit which found that the ten convictions were *Brady* material as impeaching material has always been *Brady* material. However the Third Circuit held that *Brady* was not implicated on these facts because it could not ascribe any fault to the prosecutor for not having the ten convictions because of the clerical error. *Hollman v. Wilson*, 158 F.3d 177, n.3 (3d Cir. 1998) (App. 6a) (. . . we, too, find that *Brady* is not implicated.")

The Third Circuit alternatively reasoned that even if considered *Brady* material, the result of the trial would not have been different had it been disclosed. *See Hollman v. Wilson*, 158 F.3d 177, at __ (3d Cir. 1998) (App. 8a, 11a).

In so holding the Third Circuit rejected Petitioner's argument that any trial where the verdict could rest in whole or in part on testimony bolstered by perjury, is a trial in which the requisite confidence demanded by *Kyles v. Whitely*, 514 U.S. 419 at 434, 131 L. Ed. 2d 490 at 506, 115 S. Ct. 1555 at 1566 (1995) cannot be placed. *Kyles* also emphasized that the applicable test on review involves far more than the sufficiency analysis which comforted the Third Circuit. *Kyles*, at 435, n.8.[4]

The Third Circuit held that Dawkins' perjury did not give rise to separate rights under *Brady*. But Petitioner never argued that the thrice repeated perjury that bolstered Dawkins' testimony and valorized him created separate rights under *Brady*. Petitioner did argue that the repeated perjury and the heavy reliance by the prosecutor on Dawkins' testimony which had been bolstered by his perjury is a factor, indeed a major factor, in evaluating the trial under the *Kyles* standard — whether or not this is a trial that resulted in a verdict in which confidence can be placed or whether confidence in the verdict has been undermined. On this *Kyles*, *supra*, at 434 is very clear:

---

4. Petitioner has never argued that the evidence was not sufficient to support a conviction. His defense was a reasonable doubt defense that would have been aided greatly by the use of Dawkins' ten prior convictions and the elimination of Dawkins' passing himself off as a good citizen who happened to see a crime when in fact he was a career criminal. The Commonwealth in its effort to show "overwhelming evidence" when such evidence is decidedly lacking has taken liberties with the record, arguing that Petitioner possessed a firearm that could well be the murder weapon when in fact the Petitioner was arrested within 5 to 10 minutes of the slaying and thereafter told police that his .38 which he was licensed to have because of his security job was in his apartment. Police went to his apartment and secured the .38 which was exactly where Petitioner said it would be. Ballistics could not link this weapon to the crime although a .38 caliber bullet did cause the fatal injury. To the Commonwealth the fact that Petitioner has a .38 in his residence was probative. In fact it is not.

> The question is not whether the defendant would more likely have than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial."

To Petitioner the *Brady* violation when coupled with the three instances of perjury clearly undermined confidence in the verdict because the verdict could rest in whole or in part on Dawkins testimony — testimony fortified and bolstered by his perjury.

The reasons the Third Circuit provided for affirming are erroneous and dilute the values protected by *Brady* and *Kyles*.

## STATEMENT OF FACTS

The Commonwealth presented Andre Dawkins as an alleged eye-witness who identified Petitioner as an accomplice involved in the robbery murder who assisted in the robbery but who did not shoot the deceased.

Other evidence came from Deidre Jones who alleged that she was the lookout who overheard cursory planning of the robbery while she was a passenger in a van that contained four persons, one of whom was petitioner, and the other two persons being unknown to her. Deidre Jones was an accomplice who bargained for complete immunity from prosecution for this murder in exchange for her testimony.

The prosecution also attempted to link Petitioner to the van involved in the shooting which was seen fleeing the crime's location by a cab driver who recorded its initial license plate numbers (YZA). Although Petitioner was arrested while driving a van rented from Alamo whose tag bore those first three letters, this testimony was weakened by the fact that subsequent testimony established that there were three other such vans leased from the Alamo agency that also bore the initial letters of YZA on their tags. One of those three was leased to a Denise Combs, and Dawkins had identified her photograph as being in the van involved, further weakening the link the Commonwealth tried to forge between Petitioner and the van he drove with the initial license tag letters YZA.

One other such van then on Philadelphia roads had been rented by the Alamo agency to a Denise Combs, and remarkably, Dawkins identified her as one of the females he saw in the van involved. The odds of Dawkins identifying a female who had rented a van with the initial license tag letters YZA are astronomical. The van in which Petitioner was arrested also bearing the initial license tag letters YZA had no rental connection with Denise Combs.

Finally, a police detective testified that Petitioner stated, "I told the bitch to keep her mouth shut, shit." (N.T. 4/27/93 at 1467-1474) when he was shown Deidre Jones' inculpatory statement during interrogation. Prior to being shown this statement, Petitioner had repeatedly denied any role in the robbery murder.

Post trial motions centered on the fact that a clerical error by the Philadelphia police identification unit led to trial counsel's specific request for eye witness Andre Dawkins' criminal record being met with his being provided a "clean" criminal record history which revealed no felony or

misdemeanor convictions but did reveal his arrest for burglary which occurred three days prior to his trial testimony. In truth and fact Dawkins had a lengthy criminal record of ten (10) convictions all of which were admissible to show bias and to impeach his credibility. One conviction was for making False Reports to Authorities Incriminating Another.[5]

It was conceded that the Identification Unit negligently gave Dawkins a new photo number when he was arrested three days prior to his trial testimony when in fact his fingerprints should have been calibrated to his old photo number which would have revealed his entire record of 10 prior convictions.

These convictions were admissible under Pennsylvania law to impeach Dawkins and to show bias. Dawkins not only bolstered his testimony by falsely claiming to have no record of misdemeanor or felony convictions (only summary convictions) but valorized himself and allowed the prosecutor to valorize him in turn by virtue of his perjury. Instead of the good citizen who happened upon a criminal event as he portrayed himself and was portrayed by the prosecutor, Dawkins was a career criminal who well knew the value of being a critical witness in a murder case to police and to prosecutors.

There is no question that his denials of having any convictions for misdemeanors or felonies was perjured testimony and the Third Circuit so found. *Hollman*, *supra*, n.8.

During trial when trial counsel specifically asked for Dawkins' prior criminal record, he was given a police sheet containing the open burglary arrest made three days previous with no record of prior felony or misdemeanor convictions thereon.

---

5. The other convictions were for three counts of robbery, three counts of conspiracy, theft, criminal trespass and defiant trespass.

Petitioner alleged that this comprised a *Brady* violation. Instead of severely impeach Dawkins with his past criminal career, defense counsel had no way of countering Dawkins perjured assertions — made three times — that he had no record at all of convictions for felonies or misdemeanors. The *Brady* violation led to the defense being unable to impeach Dawkins with his career criminal status, and instead, his perjury allowed Dawkins to bolster and fortify his testimony.

Petitioner submitted that the prosecutor used Dawkins as the central witness against him, concluding his summation with a plea to the jury to believe Dawkins.

The prosecutor who was closest to this case and who knew and felt its necessities — chose to rely in his summation on Dawkins as an unshaken witness in imploring the jury to convict in the final moments of his summation.

> I say to you, you have enough. I say to you, do your duty. I say to you, in the examination of Andre Dawkins, *was he shaken*? And do you think less of Andre Dawkins because of what a detective said that had nothing to do with nothing. . . . (N.T. 5/3/93 pgs. 1689-1690) (Emphasis supplied).

Not only did the prosecutor rely heavily on Dawkins, but the charge of the court invited the jury to use Dawkins testimony to shore up or corroborate the accomplice testimony of Deidre Jones. The Court gave the standard accomplice charge as to accomplice witness Deidre Jones, informing the jury that her testimony came from a "corrupt and polluted source" and should be viewed with disfavor as accomplices "will often try to place the blame falsely on someone else, and may testify falsely in the hope of obtaining favorable treatment or some other corrupt or wicked motive." (N.T. 5/3/93 pgs. 1732, 1733).

The Court instructed the jury that "Accomplice testimony is more dependable if supported by independent evidence," *Id.* 1733, inviting the jury to utilize the eyewitness testimony of Andre Dawkins to shore up what was obviously weak accomplice testimony in view of the initial denial and the "deal" Ms. Jones had — complete freedom in exchange for the implication of Petitioner. This invited the jury to use the "unshaken" Dawkins testimony to bolster and support the accomplice testimony of Deidre Jones.

And the court emphasized single witness testimony in its charge. (N.T. 5/3/93 pg. 1735, 1731-32 — "However you should recognize that it is entirely possible for a single witness to give truthful and accurate testimony and that person's testimony may be believed even though a greater number of witnesses of apparently equal reliability may have contradicted that witness.").

Thus, Petitioner's jury was asked by the prosecutor to rely on Dawkins' testimony, was invited by the trial court to use Dawkins' testimony to shore up Deidre Jones' testimony, and was also invited to convict based on the testimony of a single witness.

Petitioner was convicted of second degree murder and sentenced to life in prison.

Pennsylvania's position throughout this case has been far too tolerant of perjury — perjury which clearly caused it to be the beneficiary of police negligence. Pennsylvania succeeded in placing the risk of such police negligence and the perjury of its own witness on the accused. The Third Circuit held that *Brady* is not implicated by these facts, excused the failure to comply with basic *Brady* obligations because of the negligence of the police, overlooked the fact that Petitioner's verdict may

well rest in whole or in part on the testimony of Andre Dawkins. This was testimony that should have been impeached to the point that it would have been discarded by the jury but instead was bolstered and fortified by Dawkins' perjury. In other words because of the police negligence in "losing" the *Brady* material which was in the form of Dawkins' ten prior convictions and because of his perjury that was made possible by such negligence Pennsylvania's case was made much stronger and the reasonable doubt defense offered made much weaker than the full facts warranted.

To Pennsylvania, this is a verdict in which the confidence required by this Court in *Kyles* can be placed.

Petitioner disagrees. Further review is absolutely required.

## REASONS FOR GRANTING THE WRIT

One of the most cherished of all due process rights is the obligation of the prosecutor to disclose evidence favorable to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963) — whether it be exculpatory or impeaching.

Without this obligation, confidence in verdicts would be greatly reduced as it provides a basis in fact for our hopes that verdicts are based on the truth.

The respect paid to this obligation by the courts is directly proportionate to its efficacy. When negligence is granted the status of a full defense to the failure to fulfill the *Brady* obligation, our faith that verdicts are based on truth is shaken to the core.

When *Brady* material is not turned over to the defense, the impact on the accused is identical whether the motives of the prosecutor are good or bad.

The point of having an obligation is that it is imposed on all, and escaped by none. The *Brady* obligation is a constant obligation — to be met in all cases, whether or not there is prosecutorial misconduct, fault, outright deceit or negligence. Diluting the obligation by allowing negligence or mistake to excuse it is totally unacceptable.

The Third Circuit by virtue of its published opinion in this case has undermined the *Brady* obligation, converted that obligation into one dependent on police or prosecutorial misconduct, and allowed a negligence defense to the failure to provide the defense with material impeaching evidence to excuse such failure.

No one in this case doubts that an honest mistake was made with Dawkins' criminal record. The point of *Brady* is that such mistakes must take a toll on the prosecution, not the defense.

Of the two parties involved — prosecution and defense — one has to bear the risk of negligence by police or prosecutor that results in the failure to turn over critical evidence.

The Third Circuit has placed that burden squarely on the accused, and has allowed the prosecution to be the windfall beneficiary of its own negligence. Something is surely wrong with this picture.

Additionally, perjury exacerbated the *Brady* violation caused by the negligence of the police identification unit. On three occasions the witness to whom the *Brady* material related denied that he had any criminal record of convictions for misdemeanors or felonies when in fact he had ten (10), one of which was for Falsely Incriminating Another.

While there was other evidence in the case, and it is true that the jury could have convicted as the Third Circuit found

without relying at all on Dawkins' testimony, this manner of analysis has been constantly rejected by this Court. Sufficiency of the evidence is not the touchstone. *Kyles*, *supra*, 514 U.S. 434.

Review by this Court is required to reassert the primacy of the *Brady* obligation.

This Court in *Kyles v. Whitely*, *supra*, 514 U.S. 437-438 made it clear that information known to the police but not communicated to the prosecutors is nonetheless subject to the *Brady* requirement of disclosure to the defense. Here, Dawkins' past criminal record should have been known to police and would have been known to police had the negligence been avoided. Even so, these were Philadelphia convictions secured by Philadelphia prosecutors and it would not be unfair to hold the prosecutor's office to constructive knowledge of such convictions.

The Third Circuit held that because of the administrative mistake or negligence, *Brady* was not implicated and that it "cannot conclude that the government withheld information that was readily available to it or constructively in its possession." (App. at 8a).

A defendant is entitled to a fair trial — and the *Brady* obligations are most important in assuring a fair trial. The Third Circuit ruled that a defendant is entitled to a fair trial unless there is police negligence and then if there is such negligence which involves *Brady* material (even if aggravated by the perjury of the witness involved) if the evidence is otherwise sufficient, no relief can be secured.

This is hardly protecting and preserving this Court's long established precedent in the *Brady* area.

*Kyles* requires that a court review a case where *Brady* information is not furnished the defense in terms of whether or not there is a reasonable probability that the result would have been different, and such a reasonable probability is shown when "the Government's evidentiary suppression 'undermines confidence in the outcome of the trial.' " *Kyles* at 514 U.S. at 434.

While the Third Circuit gave lip service to this standard, it overlooked the perjured testimony — three instances thereof — in its determination of whether or not this verdict can be viewed with confidence.

Petitioner submits that in view of the fact that Dawkins was so heavily relied upon by the prosecutor in his summation and the charge of the court invited the jury to utilize his testimony in several ways, all of which were highly prejudicial to Petitioner, a reviewing court cannot be certain that the verdict returned did not rest in whole or in part on his perjury — perjury made possible by the *Brady* violation.

Where perjury resulting from a Brady violation can be so instrumental in a conviction (and the evidence not turned over shows the witness to be a career criminal and not the good citizen he passed himself off as being) no confidence can be placed in the resulting verdicts.

The Third Circuit's published opinion refused to find a *Brady* violation where one should have been found, and then refused to apply the *Kyles* test in evaluating the Brady violation. In so doing, the Third Circuit seriously diluted the Brady obligations of all prosecutors, made negligence a complete defense to a Brady violation, replaced the explicit language of Brady which did not place *Brady* no a fault basis with a prosecutorial misconduct standard. This Court must grant further review.

## CONCLUSION

For the reasons delineated above, it is respectfully submitted that this Court should grant the Writ of Certiorari herein sought.

Respectfully submitted,

NORRIS E. GELMAN
*Attorney for Petitioner*
The Public Ledger Building
620 Chestnut Street
Suite 940
Philadelphia, Pennsylvania 19106
(215) 574-0513